BEFORE THE IOWA CIVIL RIGHTS COMMISSION

STACEY D. DAVIES, Complainant, and IOWA CIVIL RIGHTS COMMISSION,

vs.

NISSEN COMPANY, SUBHASH SAHAI, M.D., and WEBSTER CITY MEDICAL CLINIC, INC., Respondents.

CP # 10-89-19302

SUMMARY[*]

This matter came before the Iowa Civil Rights Commission on the amended Complaint, alleging discrimination in employment on the basis of sex, filed by Complainant Stacey Davies against the Respondents Nissen Company, Subhash Sahai, M.D., and Webster City Medical Clinic.

Complainant Davies alleges, through her original complaint and amendment, that the Respondent Nissen Company failed to hire her because of her sex, i.e. because she was pregnant. **Through her complaint, she alleges that she was subjected to different treatment on the basis of her sex**.

A public hearing on this complaint was held on August 18, 1992 before the Honorable Donald W. Bohlken, Administrative Law Judge, at the Hamilton County Courthouse in Webster City, Iowa. The Respondents Dr. Sahai and Webster City Medical Clinic, Inc. were represented by Joseph L. Fitzgibbons, Attorney. The Iowa Civil Rights Commission was represented by Teresa Baustian. Assistant Attorney General. The Complainant, Stacey Davies, was not represented by counsel, but was present at the hearing. The Respondent Nissen Company was neither present at the hearing nor represented by counsel.

The Commission's Brief and the Respondent's Brief were received on November 16, 1992.

Complainant Davies proved her allegation of discrimination in employment because of her sex under the disparate treatment theory. The Complainant established a prima facie case of discrimination of disparate treatment in hiring by direct evidence showing (a) that she was not hired for a production line position at the Nissen Company because of her pregnancy, (b) that she was informed of this reason by both Nissen Company and Dr. Sahai, and (c) this failure to hire Complainant was based on the recommendation of Dr. Sahai that she not be hired due to her pregnancy.

The Respondents failed to establish the affirmative defense that sex (i.e. nonpregnancy) was a bona fide occupational qualification for the production line position. Respondents Dr. Sahai and the Webster City Medical Clinic, Inc. failed to establish that Nissen Company's decision, and Dr. Sahai's recommendation to the company were based on Complainant Davies's present ability or

[*] This summary is provided as an aid to understanding the decision. It is not part of the findings of fact and conclusions of law.

inability to do the work. Rather, Dr. Sahai's recommendations focused on the increased personal risks faced by Complainant Davies and her unborn child if she worked on the production line. While such concerns may have been well-intentioned, the law is clear that the pregnant female applicant is to remain free to elect to face increased personal safety risks affecting either her or the fetus. While either the employer or a doctor or other entity who hires or classifies and refers applicants for hire is free to inform her of these risks, it is for the pregnant female applicant to decide whether or not she wishes to face such risks. See Conclusions of Law Nos. 36-38.

Nor is the conduct of Dr. Sahai excused by any physician-patient relationship. First, a pre-employment physical examination of a patient, and any subsequent reports or recommendations by the physician to the employer retaining the physician, do not create a physician-patient relationship and are outside of any such pre-existing relationship. Such examinations are conducted for the purpose of reporting the medical condition or fitness of the applicant to the employer. They are not examinations sought by a patient for the purpose of diagnosis and treatment as would be found in a physician-patient relationship. See Conclusions of Law Nos. 40.

Second, even if a physician-patient relationship were said to exist, the physician is free to give his advice or warnings, but cannot compel the patient to follow his advice, even if the physician is convinced that such advice is in the best interests of the patient. The patient has virtually complete freedom to decide whether or not to follow the advice. See Conclusions of Law Nos. 42-43. Here, Complainant Davies was not given the choice as to whether to work on the production line. The choice was made for her by Respondents. See Findings of Fact Nos. 15-20.

Complainant Davies has proven her case.

Remedies awarded include $2732.99 in back pay, and $8,500.00 in emotional distress damages.

RULINGS ON OBJECTIONS:

A. Objections to Complainant's Exhibit # 3:

1. Respondents Sahai and Webster City Medical Clinic, Inc. (hereinafter referred to as "Clinic") objected to the admission of Complainant's Exhibit # 3 on the grounds of relevancy and materiality. (Tr. at 20). Complainant's Exhibit # 3 is the record of the medical history and physical performed by Dr. Birkett, complainant's physician, on or about October 23, 1989. (CP. EX. # 3; Tr. at 18, 52). This exhibit is relevant as it tends to "make the existence of [a] fact of consequence to the determination of the [contested case][i.e. the physical condition of the complainant with respect to her ability to work] more or less probable than it would be without the evidence." Iowa R. Evid. 401 (definition of relevant evidence). The exhibit is also material as it is pertinent to the issue of Complainant Davies's ability to work. BLACK'S LAW DICTIONARY 881 (5th ed. 1979)(citing Vine Street Corp. v. City of Council Bluffs, Iowa, 220 N.W.2d 860, 863 (definition of "material evidence"). The objection is overruled.

B. Objections to Complainant's Exhibit # 4:

2. Respondents Sahai and Clinic objected to the admission of Complainant's Exhibit # 4 on the grounds of relevancy and materiality. (Tr. at 27). Complainant's Exhibit # 4 is the bargaining agreement between the Nissen Company and the United Food and Commercial Workers of North America. It was offered solely for the purpose of assisting in the determination of back pay as wage rates are set forth within it. (Tr. at 27). The exhibit is relevant and material for that purpose. The objection is overruled.

3. Respondents Sahai and Clinic objected to the admission of Complainant's Exhibit # 5 on the grounds of relevancy and materiality. (Tr. at 94). Complainant's Exhibit # 5 is a record of a telephone communication from Nissen Corporation's attorney to the Commission indicating the back pay of the person hired for the position for which the Complainant applied. It was offered solely for the purpose of assisting in the determination of back pay. (Tr. at 94). The exhibit is relevant and material for that purpose. The objection is overruled.

4. The Commission objected to questions asked by Respondents Sahai and Clinic concerning Complainant Davies's arrests for two crimes, possession of a weapon and auto theft, for which she was never convicted, on grounds of relevancy. (Tr. at 47-50). The reason offered by Respondents for asking these questions is that this information would be sought by potential employers and would affect her employability in such a manner as to make it difficult for her to mitigate damages. However, the record shows that Complainant Davies was never asked about arrests or any criminal record by potential employers. (Tr. at 46).

5. It is certainly within the specialized knowledge of this Commission that such questions, at least with respect to arrest records, are now rarely asked by employers. Official notice is taken of this fact. Fairness to the parties does not require that they be given the opportunity to contest this fact. *See* Iowa Code*S* 17A.14(4). The reason such questions are now rarely asked is because it is well recognized that such questions are often found to be racially discriminatory and illegal. *See e.g.* Schlei & Grossman, Employment Discrimination Law 175 (1983). The objection is sustained.

6. Even if the Commission's objection had been overruled, the information solicited would be entitled to no weight for three reasons. First, the evidence shows that no employer ever made such inquiry of complainant. (Tr. at 46). Second, there is no evidence as to when these arrests occurred. Complainant Davies can hardly be said to have "unreasonab[ly] fail[ed] to seek employment", Children's Home of Cedar Rapids v. Cedar Rapids Civil Rights Commission, 464 N.W.2d 478, 482 (Iowa Ct. App. 1990), as part of her mitigation of damages, based on events occurring before the rejection. Third, as the United States Supreme Court has noted, "The mere fact that a [wo]man has been arrested has very little, if any, probative value in showing that [s]he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense." Id. at n.61 (quoting Schware v. Board of Bar Examiners, 353 U.S. 232, 241 (1957)).

FINDINGS OF FACT:

I. JURISDICTIONAL AND PROCEDURAL FACTS:

A. Subject Matter Jurisdiction:

1. Complainant Davies alleges Respondents were responsible for the failure to hire her for a full-time production (line) position at the Nissen Company because of her sex, i.e. because she was pregnant. (Notice of Hearing- Complaint and amendment). This allegation brings her complaint within the subject matter jurisdiction of the Commission. See Conclusions of Law No. 2.

B. Procedural Matters:

2. Complainant Stacey Davies filed her original complaint in October of 1989 against the Nissen Company. This complaint alleged sex discrimination in employment which is prohibited by Iowa Code section 601A.6 (now 216.6). The date of the alleged discriminatory failure to hire her because of her pregnancy is September 8, 1989. Thus, the original complaint was filed less than one hundred eighty days after the alleged act of discrimination. This complaint was subsequently amended on February 15, 1990 to name Subhash Sahai, M.D. and Webster City Medical Clinic, Inc. as Respondents.
3. The complaint was investigated. After probable cause of race discrimination was found, conciliation was attempted and failed. Notice of Hearing was issued on August 18, 1991. (Notice of Hearing).

C. No Appearance By Counsel or Party With Respect to the Nissen Company:

4. The Respondent Nissen Company was neither present at the hearing nor represented by counsel. It's counsel had withdrawn their appearance on behalf of the company because it "is without employees, funds or other resources with which to continue to defend the claim . . . against it." (Withdrawal of Appearance). There has been no motion to withdraw or dismiss the charges against Nissen Company. Therefore, it is treated as an active party in this case.

II. BACKGROUND:

5. Respondent Nissen Company is a meat-packing facility. (Tr. at 100). There is no kill floor at this facility. The primary work there was to pack some of the smaller processed meat products, including wieners or franks. (Tr. at 118-19, 133).

6. Complainant Davies, a female, applied for work with Respondent Nissen Company by filling out a standard Job Service of Iowa application on July 14, 1989. (CP. EX. # 1; Tr. at 7-8). She was screened by the Job Service office in Fort Dodge, where she took a standardized GATB test battery. (Tr. at 8). She was subsequently called for an interview with Kenneth Hakes, vice-president of production with Nissen. (Tr. at 8-9, 71).

7. Mr. Hakes interviewed Complainant Davies on September 8, 1989 for a position on the production line. (Tr. at 9-10, 73). Hakes determined that Davies was qualified and asked her if she wanted the job. She indicated she did. He then informed her, in accordance with Respondent Nissen's standard procedure, that she would have to have a medical physical examination and drug test at Respondent Clinic. (Tr. at 10-11, 73). Respondent Nissen made arrangements for Complainant Davies's examination at the Clinic. (Tr. at 11). Davies was examined at Respondent

Clinic on the same day, immediately after leaving the interview with Mr. Hakes's office. (R. EX. A; CP. EX. # 2; Tr. at 12). She understood she would have to successfully complete and pass this physical in order to be hired by Respondent Nissen. Any offer of employment was clearly conditioned on successfully passing the exam. (R. EX. B at p. 65; Tr. at 36-37). Complainant Davies was never hired by Nissen. See Finding of Fact No. 16. She was approximately one and one-half months pregnant at this time. (Tr. at 11).

7A. When Complainant Davies arrived at the Clinic, she initially met with Dr. Schultz. She informed Dr. Schultz that she was pregnant and that Dr. Sahai had been her doctor when she had been pregnant with her first child. Dr. Schultz then suggested that Dr. Sahai should see her. Dr. Sahai came in and asked if she was pregnant and Ms. Davies responded in the affirmative. During the course of the examination, Respondent Sahai measured Complainant Davies' stomach and listened to the fetal heartbeat. They also discussed her pregnancy. (Tr. at 12-13).

8. Respondent Clinic is a corporation with a staff of six physicians. Respondent Dr. Subhash Sahai is associated in the practice of medicine with the Clinic and is president of that corporation. (CP. EX. # 6 at p.3; Tr. at 95-96, 99-100). Respondent Dr. Sahai is a certified family practice specialist. (Tr. at 98).

9. Respondent Clinic had an oral agreement with Respondent Nissen Corporation whereby the Clinic agreed to do applicant employment physical examinations, drug testing, and to provide medical care for injured employees for Nissen. (CP. EX. # 6 at p. 4-5; Tr. at 100-01, 125-26). The Clinic was paid by Nissen on a per applicant basis. (Tr. at 125, 128-29). This arrangement was in effect for approximately ten years. (Tr. at 100).

10. Respondent Nissen interviewed applicants and preliminarily determined those whom it wished to hire. It would then send those applicants only to Respondent Clinic for their physical examination. The final decision to hire, however, was wholly contingent on passing the physical examination. (Tr. at 36-37, 127-28). Dr. Sahai's final recommendation could not be overridden by those at the Nissen plant. During the course of the investigation, Vice- President Hakes went so far as to say that Dr. Sahai made the final decision on hiring at Nissen. (Tr. at 75-77). At one point in the testimony Dr. Sahai suggested that Nissen overruled him with respect to Sahai's recommendation to not hire a chemist. (Tr. at 102-03). However, his deposition testimony clearly indicates that, after Nissen requested the grounds for his decision, he obtained further information on the chemist's duties. He then approved the hire of the chemist. (C. EX. 6 at p. 17-18).

11. Respondent Clinic was also employed by five other companies for similar services. (CP. EX. # 6 at p. 6; Tr. at 101, 126). The doctors visit with the companies' administrations and their plants in order to ascertain what is entailed in the different kinds of work done by employees. (Tr. at 101). This is done so the doctors will have firsthand knowledge of working conditions which they rely on when making recommendations for employment after administering the physical examinations to applicants. (Tr. at 101-02). Respondent Sahai visited Nissen three or four times in order to familiarize himself with the plant and the work done there. (Tr. at 101).

12. With respect to the examination of Nissen's job applicants, Dr. Sahai contacted Nissen and verbally informed them as to whether the applicant was recommended for employment. He would also send Nissen a standard form which would indicate with a "yes" or "no" whether the applicant was recommended for hire. (R. EX. A; CP. EX. # 2, 6 at p. 15- 16). Respondent Sahai would often not inform Nissen Company of the specific reason that applicants would be rejected. (CP. EX. # 6 at p. 16-17).

13. Respondent Clinic clearly is in the business of providing services for Nissen Company and other employers. Those services include classifying applicants for hire as being fit or unfit for employment, based on physical examinations and the knowledge and judgment of the doctor, and either referring them to the employer for employment or recommending that they not be employed. (Tr. at 126-28). See Findings of Fact Nos. 8-12.

14. Respondent Nissen and Respondent Clinic agreed that the Clinic would act for the benefit of Nissen in the undertaking of examining applicants and determining whether the applicants would be finally selected for employment or rejected. See Findings of Fact Nos. 9-10. Nissen controlled the undertaking in the sense that (a) it alone determined which applicants it sent to Respondent Clinic and (b) the purpose of the relationship was to ascertain if applicants were fit for work at Nissen. See Findings of Fact Nos. 10-13. Respondent Nissen did not, however, control the doctors' professional judgment, recommendations, examination methods or criteria, or physical conduct. (Tr. at 126). With respect to these matters, Nissen relied on the doctors', specifically Dr. Sahai's, professional expertise. (CP. EX. # 6 at p. 13-14; Tr. at 126-27). For reasons set forth in the conclusions of law, these facts are sufficient to show that Respondent Clinic was an agent of Respondent Nissen. See Conclusions of Law Nos. 14-22.

III. DIRECT EVIDENCE THAT RESPONDENTS DID NOT HIRE COMPLAINANT DAVIES OR REFER HER FOR HIRE FOR THE PRODUCTION LINE POSITION BECAUSE OF HER PREGNANCY:

15. There is massive credible direct evidence in the record indicating that Respondents Sahai and Clinic refused to recommend Complainant Davies for hire for production line work because of her pregnancy and that Respondent Nissen Company followed this recommendation. After Dr. Sahai examined Ms. Davies, he informed her that he was going to recommend that Respondent Nissen Company not hire her. (Tr. at 13, 109-110). He then had a telephone conversation with Mr. Hakes at Nissen Company. Respondent Sahai admitted, on deposition, that he told Mr. Hakes **"I do not think that you should hirea new employee to be doing assembly type of work who's pregnant."** (CP. EX. # 6 at p. 36). Sahai's deposition testimony is consistent with his credible testimony at hearing on this issue. (Tr. at 72-73, 110). Respondent Sahai went on to ask Hakes if other suitable employment was available for complainant and was informed there was not. (Tr. at 111).

16. Respondent Sahai then told Complainant Davies that he was going to recommend she not be hired for the assembly line position because of complications in her first pregnancy. (R. Ex. B at p. 67; C at 3, 5; Tr. at 15-16). These complications consisted of pain in her right side. (Tr. at 16). Dr. Sahai also told Ms. Davies that she could call Nissen Company on Monday, but he didn't think she would be hired. (Tr. at 13). On the following Monday, Complainant Davies telephoned

Respondent Nissen Company and was informed by a person named Georgeann that she was not being hired "because of your pregnancy." (R. EX. B at p. 70; Tr. at 16- 17).

17. During the hearing, Respondent Sahai also credibly admitted he had a policy of not hiring pregnant women for assembly [or production] line work at Nissen Company:

> Q. [By Baustian]: . . . In fact, **you do have a blanket policy for permitting pregnant women to work on the assembly line**, do you not?
>
> A. [By Sahai]: **Well, you're correct.** For the assembly line, yes, there is. If you want to call that a blanket policy, yes, I'll give in to that.
>
> Q. [By Baustian]: It's your policy not to permit pregnant women to work on the assembly line for Nissen Company. That is your policy, isn't that correct?
>
> A. [By Sahai]: That's not correct. **The policy is not to newly hire women who are pregnant for assembly line work.**
>
> Q. [By Baustian]: So, in essence, though when you are approving people for their pre-employment physical, that would be a newly hired person?
>
> A. [By Sahai]: That's correct.
>
> Q. [By Baustian]: **You would not approve someone for hire on the assembly line who is pregnant?**
>
> A. [By Sahai]: **That's correct.**
>
> Q. [By Baustian]: And the sole reason for that is the pregnancy, isn't that right, Doctor?
>
> A. [By Sahai]: And assembly line work.

(Tr. at 124-25)(emphasis added).

18. With respect to Ms. Davies, Respondent Sahai credibly admitted, at hearing, that he chose to recommend against her employment because of his policy of not permitting newly-hired pregnant women in assembly line positions. (Tr. at 130-31). At his deposition, Respondent Sahai admitted: "My basis of recommendation [to not hire Complainant Davies] was two-fold: Number 1, that she was going to be doing assembly line work and Number 2, she was pregnant at the time." (CP. EX. # 6 at p. 22). "That I [Dr. Sahai] would not let any pregnant woman go to work on assembly line work. I know that for a fact." (CP. EX. # 6 at 25).

19. The physical examination notes, dated September 8, 1989, which were retained by Dr. Sahai and not sent on to Nissen, state: "Refused work if preg. on assembly line." (R. EX. A; CP. EX. # 6 at p. 14-15; Tr. at 113). The Physical Examination Record of that date filled out by Dr. Sahai

and sent to Respondent Nissen Company has a checkmark by the "No" response to the question: "Approved for work?". (R. EX. A; CP. EX. # 2; 6 at p. 14-15; Tr. at 113).

20. During the course of the investigation, Respondent Nissen Company's vice-president Hakes admitted Complainant Davies was not hired because of Respondent Sahai's recommendation that she not be hired due to her pregnancy. (Tr. at 72-73).

IV. RESPONDENTS HAVE FAILED TO ESTABLISH THAT NONPREGNANCY IS A BONA FIDE OCCUPATIONAL QUALIFICATION (BFOQ) FOR THE POSITION OF ASSEMBLY LINE (PRODUCTION LINE) WORKER:

A. Respondents Sahai and Clinic Have Admitted, On Brief, the Reasons For Dr. Sahai's Recommendations, All of Which Are Related to IncreasedRisks Faced By Complainant Davies Due to Her Pregnancy:

21. On brief, Respondents Sahai and Clinic have set forth reasons for the recommendation that Complainant Davies not be hired for the position of assembly line worker. While an attempt is made to argue that these reasons are somehow separate from pregnancy, their one common denominator is that each represents an increased risk to her health which Complainant Davies, as a pregnant female, might face on the assembly line which she would not confront if she were not pregnant. (Respondent's Brief at 21-26). Respondents Sahai and Clinic admit that Dr. Sahai's reasons constitute "concerns about her (Complainant's) health" or "concerns regarding the health of [Complainant Davies]." (Respondent's Brief at 21, 26). These admissions on brief are contrary to Respondents Sahai's and Clinic's interests and are binding on the Commission. See Conclusions of Law Nos. 3A. For reasons set forth in the conclusions of law, none of these reasons prove that nonpregnancy is a bona fide occupational qualification for the position of assembly line worker at the Nissen Company. See Conclusions of Law Nos. 35-38.

B. There Is No Evidence In the Record That Dr. Sahai's Recommendations Were Based on Safety Risks to Anyone But Complainant Davies:

22. There is no evidence in the record that the decisions of Respondents Sahai, Clinic, and Nissen Company with respect to hiring Complainant Davies were in any way based on any safety risk to Nissen Company employees, customers or other third persons. On brief, Respondent argues that Dr. Sahai's recommendation was based on "concerns regarding the health of [Complainant Davies] and the health of her unborn fetus," (Respondent's Brief at 25-26). However, the only specific health concerns expressed in the record by Dr. Sahai, with respect to his recommendations to Respondent Nissen Company on Complainant Davies, were concerns with increased risks to her health. See Findings of Fact Nos. 23-30.

C. Incremental Safety Risks Related To Complainant Davies's Pregnancy Were Relied on by Respondent Sahai In Making Recommendations toRespondent Nissen Company:

23. It has already been found (a) that Respondent Sahai had a policy of not hiring pregnant females for assembly line positions, and (b) that this policy was invoked by Respondent Sahai in making his recommendation to not hire Complainant Davies. See Findings of Fact Nos. 17-18.

Respondent Sahai also admitted that the possible ailments which he thought might result from assembly line work by a pregnant female were not ones he had observed in Complainant Davies. Rather, his concerns with respect to Complainant Davies were based on "generalizations about pregnant women." (CP # 6 at p. 35-36).

24. The specific concerns of Respondent Sahai with respect to Complainant Davies working on the assembly line were: (1) increased risk of carpel tunnel syndrome associated with pregnancy, (2) the back pain associated with pregnancy, and (3) the joint pain associated with pregnancy. (Tr. at 109).

25. Persons, whether pregnant or not, performing repetitive activities on an assembly line, such as working with a knife, lifting, bending and packing, have an increased risk of sustaining cumulative trauma disorders such as carpel tunnel syndrome. (Tr. at 106). With respect to lifting, there is some evidence suggesting that there were lifting requirements of approximately 50 pounds. (R. EX. B at p. 31; Tr. at 119). Complainant Davies, however, was subsequently hired for the assembly line by Respondent Nissen Company in June of 1990, after her pregnancy. At that time, she only had to lift a maximum weight of 10-15 pounds. (Tr. at 137-38). There were, in any event, assistive devices to aid assembly line workers with lifting tasks. (Tr. at 119).

26. The risk of carpel tunnel syndrome is exacerbated by pregnancy. (Tr. at 106). There is, however, no evidence in the record showing statistical estimates of the incidence, probability, or degree of risk for carpel tunnel syndrome, backache or joint pain for either pregnant or nonpregnant employees.

27. On deposition, Dr. Sahai testified that there is a "high incidence" of carpel tunnel syndrome in pregnant employees. (CP. EX. # 6 at p. 25-26). But it is not shown in the record how this translates into numbers. For example, is a "high incidence" of one out of one thousand being compared to a "normal incidence" of one out of ten thousand? At hearing, Dr. Sahai testified that assembly line workers in general have a "high incidence" of cumulative trauma disorders, of which carpel tunnel syndrome is one. (Tr. at 106). There are no estimates in the record showing what percentage of pregnant or nonpregnant employees doing repetitive work can be expected to suffer from the syndrome over any given period of time.

28. Either nonpregnant or pregnant employees working on an assembly line may have joint pain. In thirty to forty degree temperatures, as at Nissen, this may be complicated by a stiffness of the joints known as gelling phenomenon. (Tr. at 109).

29. The preponderance of the evidence in the record demonstrates that Dr. Sahai never had any reason to believe that Complainant Davies had ever experienced carpel tunnel syndrome or any other form of cumulative trauma disorder, back pain, or joint pain. (R. EX. A; CP # 6 at p. 35-36; Tr. at 121, 124). He had been Complainant Davies's doctor during her first pregnancy in 1987. Davies had complained of abdominal pain on one occasion during that pregnancy. At another point, she had complained of a headache. (Tr. at 121-22). At the end of Dr. Sahai's examination of Complainant Davies for Nissen, on September 8, 1989, she stood before him as a basically healthy pregnant woman. (R. EX. A; C. EX. # 2; Tr. at 124).

D. There is No Evidence To Suggest That Pregnant Females Were Necessarily Unable to Perform the Job of Assembly Line Worker.

30. There is no evidence that Complainant Davies was unable, on September 8, 1989, to do the assembly line work. Dr. Sahai's concerns involved only incremental future risks to Complainant Davies, and not any present inability to perform the job. See Findings of Fact Nos. 23-29. At least one woman, who was hired by Respondent Nissen prior to her pregnancy, did work on the assembly line while pregnant. (R. EX. B at p. 38).

V. AT THE TIME OF HER EXAMINATION ON SEPTEMBER 8, 1989, COMPLAINANT DAVIES AND DR. SAHAI DID NOT HAVE A CURRENT PHYSICIAN-PATIENT RELATIONSHIP:

31. On brief, Respondents Sahai and Clinic repeatedly refer to Complainant Davies as being a "former patient" of Dr. Sahai's at the time he made his recommendation to Respondent Nissen. (Respondent's Brief at 21, 25). The Commission is bound by these admissions on brief. See Conclusions of Law No. 3A.

32. Furthermore, the evidence previously discussed demonstrates that Complainant Davies did not go to Respondent Clinic on September 9, 1989 for diagnosis and treatment. She went there at the direction of Respondent Nissen Company so she could be examined for a recommendation or referral by the Clinic with respect to her employment at Nissen. See Findings of Facts Nos. 6-7A, 9-14, 19-20.

33. Respondent Sahai did not know if it would have been a breach of medical ethics, as set forth in the Hippocratic Oath's admonition to do no harm, for him to recommend Complainant Davies for employment at Nissen. (Tr. at 114- 15). He did feel uncomfortable in sending her to work there. (Tr. at 114). However, as pointed out in the Conclusions of Law, the applicability of the Hippocratic Oath depends on a present physician-patient relationship. See Conclusion of Law No. 42. In light of these facts, it must be concluded that Complainant Davies and Dr. Sahai did not have a physician-patient relationship at the time of the examination on September 8, 1989.

VI.REMEDIES:

A. Back Pay:

1. Gross Earnings:

34. If Complainant Davies had started work on September 11, 1989, the Monday following the examination, she would have received a total gross income of four thousand eighty- five dollars and seventy cents ($4,085.70). This amount is based on a representation made by Respondent Nissen Company's attorney, during a telephone conversation to a Commission staff member on September 21, 1990. The attorney indicated that the person hired in Davies's place received this amount from the time of hire until a plant layoff on December 8, 1989. (C. EX. # 5). This amount is also consistent with the amount mentioned by Complainant Davies during her deposition testimony. (R. EX. B at 72).

35. This figure is also consistent with Complainant Davies's testimony that Hakes had informed her she was to be hired at $7.65 per hour. (Tr. at 25). Due to a new union contract at Nissen, the pay for General Pack Labor positions was increased to $8.05 per hour effective October 6, 1989. "General Pack Labor" was the designation for the lowest paid positions under the contract. (CP. EX. # 4). Use of this classification is consistent with evidence indicating Davies had applied for a "laborer" position, (R. EX. C at 6). The standard work week at Respondent Nissen was a forty hour week. (C. EX. # 4).

36. Using these facts, an estimate of Complainant Davies's earnings from September 11, 1989 to December 8, 1989 follows:

A. Gross earnings for the 4 week period from September 11, 1989 to October 6, 1989 at the rate of $7.65 per hour: 40 hours/week X 4 weeks X $7.65 per hour = $1224.00.

B. Gross earnings for the 8.8 week period from October 7, 1989 to December 8, 1989 at the rate of $8.05 per hour for a 40 hour week = 40 hours/week X 8.8 weeks X $8.05 per hour = $2833.60.

C. ESTIMATED TOTAL GROSS EARNINGS FROM SEPTEMBER 11, 1989 TO DECEMBER 8, 1989 = (A + B) = ($1224.00 + $2833.60) = $4057.60.

37. Since the exact amount of gross income paid to the person who was hired in place of Complainant Davies **($4,085.70)** is already in the record, that amount is established as what the Complainant's total gross earnings would have been if she had not been rejected for the assembly line laborer position on September 8, 1989. See Finding of Fact No. 34.

2. Interim Earnings:

38. After her rejection at Nissen, Complainant Davies worked at Flashmart for a maximum of six weeks. She worked there for an average of 17.5 hours per week at the minimum wage. (Tr. at 23-24). Official notice is taken that, in 1989, the minimum wage was $3.35 per hour. Fairness to the parties does not require that they be given the opportunity to contest that fact. Therefore, her interim earnings at Flashmart would be: $3.35 per hour X 17.5 hours per week X 6 weeks = $351.75. She left for a higher paying full-time job at CDS. (Tr. at 23).

39. Complainant Davies was at CDS for a 12 to 16 weeks. (Tr. at p. 24). Since Davies would only have been at Nissen a total of 12.8 weeks, including the six week period she was with Flashmart, it is necessary to determine what her earnings would have been at CDS only for the remaining 6.8 week period. Complainant Davies was paid an amount somewhere between the minimum wage (of $3.35 per hour) and $4.00 per hour. (Tr. at 24). The midpoint between those two amounts is $3.68 per hour. Therefore her interim earnings for seven weeks at CDS may be estimated as follows: $3.68 per hour X 40 hours/ week X 6.8 weeks = $1000.96.

40. TOTAL INTERIM EARNINGS = [Interim earnings at Flashmart + Interim Earnings at CDS] = $351.75 + $1000.96 = **$1352.71.**

3. Total Back Pay After Deduction of Interim Earnings:

41. Total Back Pay = [Gross Back Pay - Interim Earnings] = $4,085.70 - $1352.71 = **$2732.99 TOTAL BACK PAY.**

B. Emotional Distress Damages:

42. Complainant Stacey Davies suffered substantial and serious emotional distress due to the Respondents respective failure to recommend her for hire or to hire her at the Nissen Company because of her pregnancy.

43. When Respondent Sahai informed Complainant Davies that he was going to recommend that she not be hired for the job, she asked him why and started to cry. (Tr. at 29). She had many feelings and reactions to her rejection. "I was hurt, I was mad, because I knew I needed the job." She felt it was a violation of her civil rights "[b]ecause I didn't feel that--they couldn't do that to me just because I was pregnant. I mean I was healthy. I could do the job. I didn't feel that there was no reason that they shouldn't hire me for the job." (Tr. at 30-31).

44. Prior to her rejection for the position, Complainant Davies was happy and excited about the prospect of well-paying employment with Respondent Nissen Company. (Tr. at 78). She needed the medical insurance for herself and her children. She hoped she would be able to get her own place and take care of her kids, i.e. her first child and the unborn child. (Tr. at 66, 78, 83). Once the recommendation was made that she not be hired, Complainant Davies became depressed and angry due to the recommendation and the failure to hire her. (Tr. at 80).

45. The Complainant talked frequently to her mother about the decision to not hire her. (Tr. at 84). Davies became withdrawn, didn't want to do anything, and wanted "to stay home and more or less mope around." (Tr. at 85). The depression arising out of these events lasted to at least one year after the birth of the child on April 2, 1990. (Tr. at 12, 85-86).

46. There is another event which came about due to several factors, including Complainant's being rejected for the position at Nissen. That event is that Complainant Davies gave up her infant, Zach, for adoption at birth. (Tr. at 31-32). There can be little doubt, based on all the evidence, that event has caused and still causes Complainant Davies substantial emotional distress. (Tr. at 31-33, 65-66, 80-81, 84).

47. During the course of the hearing, for example, while testifying that, "because I didn't get the job at Nissen's I couldn't support my kids, so I had to give my baby up for adoption," Complainant Davies broke down crying. A five minute recess was taken at that point to allow the witness to regain her composure. (Tr. at 31-32). However, because factors other than the failure to hire at Nissen's were involved, care has been taken to ensure that any award does not include damages resulting from these other factors.

48. These other factors, which also played a part in the decision to give her infant up for adoption, included Complainant's reluctance to go on welfare for support, the short-term nature of the relationship Complainant Davies had with the father, and a lack of knowledge about the father. (Tr. at 32, 35-36, 88-89).

49. While Complainant Davies has not consulted with doctors concerning the emotional distress arising from all these events, she does consult with her mother, sister and a counselor, Marlae Beukelman, who was provided by the Bethany Christian Service as part of the adoption process. (Tr. at 32-34, 36, 65-66, 68, 80-84, 86-87). As of the date of the hearing, Complainant Davies consulted with her counselor not only with respect to the adoption, but also concerning the distress arising from the failure of Nissen Corporation to hire her. (Tr. at 33, 66).

50. Given the duration and severity of the emotional distress arising from the failure of Respondents to recommend her for hire or to hire her due to her pregnancy, an award in the sum of eight thousand five hundred dollars ($8,500.00) is full, reasonable, and adequate compensation for the distress sustained by Complainant Davies due to sex discrimination.

CONCLUSIONS OF LAW:

I. Jurisdiction and Procedure:

II.

A. Timeliness:

1. Complainant Stacey Davies's complaint was timely filed within one hundred eighty days of the alleged discriminatory practice. Iowa Code §601A.15(11) (now 216.15(11)). See Finding of Fact No. 2. All the statutory prerequisites for hearing have been met, i.e. investigation, finding of probable cause, attempted conciliation, and issuance of Notice of Hearing. Iowa Code §601A.15 (now 216.15). See Finding of Fact No. 3.

B. Subject Matter Jurisdiction:

2. Subject matter jurisdiction ordinarily means the authority of a tribunal to hear and determine cases of the general class to which the proceedings in question belong. Tombergs v. City of Eldridge, 433 N.W.2d 731, 733 (Iowa 1988). Ms. Davies's complaint is within the subject matter jurisdiction of the Commission as the allegation that the Respondents were responsible for the failure to hire her for an assembly line position at Nissen because of her sex (pregnancy) falls within the statutory prohibition against unfair employment practices which the Commission has the power to hear and determine. Iowa Code §§601A.6,.15 (now §§216.6, .15). *See* Quaker Oats Co. v. Cedar Rapids Human Rights Commission, 268 N.W.2d 862, 867 (Iowa 1978); (discrimination on the basis of pregnancy constitutes discrimination on the basis of sex); Cedar Rapids Community School District v. Parr, 227 N.W.2d 486, 494-95 (Iowa 1975)(same).

III. Official Notice:

IV.

3. Official notice was taken a specific fact. See Rulings on Objections No. 5.

> 10. Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. Iowa Code § 17A.14(4) (1991). Judicial notice may be taken of matters which are "common

> knowledge or capable of certain verification." In Re Tresnak, 297 N.W.2d 109, 112 (Iowa 1980).

Dorene Polton, 10 Iowa Civil Rights Commission Case Reports 152, 160 (1992).

III. Admissions on Brief:

3A. There are several allegations made on brief by a party which are binding on the Commission because such allegations are adverse to the party making them. See Findings of Fact Nos. 21, 31.

> When an allegation, *which militates against the party making it*, is made on pleadings or in a brief, and such allegation has not been withdrawn or superseded, **it binds the party making it and must be taken as true by a court, administrative agency, or other finder of fact.** *See*Grantham v. Potthoff-Rosene Company, 257 Iowa 224, 230-31, 131 N.W.2d 256 (1965)(cited in Wilson Trailer Co. v. Iowa Employment Security Comm'n, 168 N.W.2d 771, 776 (Iowa 1969)). *See also* Larson v. Employment Appeal Board, 474 N.W.2d 570, 572 (Iowa 1991).

Maxine Boomgarden, CP # 07-86-14926, slip. op. at 59 (Iowa Civil Rights Comm'n October 12, 1993).

IV. Respondents Dr. Sahai and the Webster City Medical Clinic Can Be Held Liable For Recommendations Which Resulted In the Sex Discriminatory Failure to Hire Complainant Davies:

A. The Iowa Civil Rights Act's Prohibitions Against Sex Discrimination in Employment Are Not Limited To Those Who Make Final Decisions inthe Hiring Process:

4. On brief, Respondent cites a Michigan Court of Appeals case for the proposition that Respondents Sahai and Clinic cannot be held liable for any hiring discrimination against Complainant Davies because they were not "ultimately responsible" for the hiring decision. Anspach v. City of Livonia, 364 N.W.2d 336 (Mich. App. 1985). Respondent's Brief at 12.

5. The facts of Anspach are radically different from those here. In Anspach, a female, who had unsuccessfully applied for a court officer position, filed a sex discrimination action against both the district court judge and the city responsible for funding the district court. Anspach at 337, 339. By statute, the authority to hire court employees was vested solely in the judge. Id. at 339. Much unlike the present case, it is clear that the city had no role whatsoever in making hiring decisions or recommendations for court officers. *See id*. at 338-39. In the present case, Respondents Dr. Sahai and the Clinic not only made hiring recommendations, but these recommendations were considered final and not overridden by Respondent Nissen Company. They were, in a very real sense, final and ultimate hiring decisions. See Findings of Fact Nos. 9-10.

6. In any event, the Iowa Civil Rights Act does not limit liability to those who make final or ultimate hiring decisions. The Act states, in part:

> 1. It shall be an unfair or discriminatory practice for any:
> a. person to refuse to hire, accept, register, classify, or refer for employment . . . any applicant for employment. . . because of the . . . sex . . . of such applicant or employee.

Iowa Code § 601A.6(1)(a) (now § 216.6(1)(a)).

7. Persons who refuse to "classify" applicants "for employment" or "refer" them "for employment," as well as those who "refuse to hire . . . for employment" can be held liable under the Act. *See id*. A "person" is defined, in part, as meaning "one or more individuals . . . [or] corporations." Iowa Code § 601A.2(10) (now 216.2(10)).

8. The prohibition of these acts by a "person," as opposed to an "employer," which is defined, in part, as "every . . . person employing employees within the state," Iowa Code § 601A.2(6) (now 216.2(6)), indicates that the prohibitions concerning actions respecting applicants are not limited to employers. The structure of the "unfair employment practices" section of the Act indicates that certain prohibitions are intended to apply to "person[s]", Iowa Code § 601A.6(1)(a)(d) (now 216.6(1)(a)(d)); while others apply to "labor organization[s]," id. at 601A.6(1)(b) (now 216(1)(b)), or a combination of "employer[s], employment agenc[ies], labor organization[s]," id. at 601A.6(1)(c) (now 216.6(1)(c)).

9. In determining the legal effect of the prohibitions against persons refusing to hire, classify, or refer applicants for employment because of sex, the Act is to be "construed broadly to effectuate its purposes." Iowa Code § 601A.18 (now 216.18). Respondents Sahai and Clinic are both "persons" who failed to classify Complainant Davies as being fit for employment or to refer her for employment due to her sex. They were responsible, through their recommendation to Respondent Nissen Company, for the failure to hire Complainant Davies due to her sex. Respondents Sahai and Clinic are liable for their violations of the Act.

B. Respondents Sahai and the Webster City Medical Clinic Can Be Held Liable For Sex Discriminatory Recommendations Because TheyControlled Complainant Davies's Access to Employment Opportunities With Respondent Nissen Company:

10. Federal courts considering discrimination cases filed under Title VII of the Civil Rights Act of 1964 have repeatedly held "**Title VII may apply even inthe absence of a direct employment relationship between the plaintiff and defendant when a defendant interferes in a plaintiff's employmentopportunities with a third party where the defendant controls access to those opportunities.**" Pelech v. Klaff-Joss, 61 Fair Empl. Prac. Cas. 507, 508 (D. N.D. Ill. 1993)(citing Sibley Memorial Hospital v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973); Doe on Behalf of Doe v. St. Joeseph's Hospital, 788 F.2d, 411, 422-23 (7th Cir. 1986); Vakharia v. Swedish Covenant Hospital, 765 F. Supp. 461, 465-66 (N.D. Ill. 1991)). *See also* Pardazi v. Cullman Medical Center, 838 F.2d 1155, 46 Fair Empl. Prac. Cases 236, 238 (11th Cir. 1988); Zaklama v. Mt. Sinai Medical Center, 842 F.2d 291, 46 Fair Empl. Prac. Cas. 913, 916 (11th Cir.

1988); Williams v. City of Montgomery, 742 F.2d 586, 37 Fair Empl. Prac. Cas. 52, 54 (11 Cir. 1984), *cert. den'd*, 37 Fair Empl. Prac. Cas. 376 (U.S. 1985); Mitchell v. Tenney, 650 F. Supp. 703, 706, 42 Fair Empl. Prac. 1220 (N.D. Ill. 1986); Patzer v. Board of Regents, 577 F. Supp. 1553, 37 Fair Empl. Prac. Cas. 1019, 1021 (D. Wis. 1984), *rev'd and rem'd on other grounds*, 763 F.2d 851, 37 Fair Empl. Prac. 1847 (7th Cir. 1985); Puntillo v. New Hampshire Racing Comm., 375 F. Supp. 1089, 10 Fair Empl. Prac. Cas. 292, 294 (D. N.H. 1974); 3 Employment Discrimination Coordinator ¶ 23224 (1994).

11. In Pelech, the complainant was a female security guard working for a company providing security services for a building. Pelech at 507. She learned that the owners of the building were hiring a new elevator operator. Id. While the owners had the final authority to decide who to hire for the position, the interviews and recommendations for the position were conducted by a cleaning company which provided janitorial services under contract to the building owners. Id. at 507, 509. Complainant applied, but was denied the position. She then sued both the building owners and the cleaning company for sex discrimination in hiring. Id. at 507-08. Although the final decision to not hire her was made by the building owners, **the suit was also permitted to proceed against the cleaning company because a discriminatory failure to recommend an applicant for employment by an entity that controls theapplicant's access to that employment is a violation of Title VII.** Id. at 508-09. **In the instant case, there is no doubt that Respondents Clinic andSahai controlled Complainant Davies's access to employment with Respondent Nissen Company and denied such access because of her pregnancy.**See Findings of Fact Nos. 7-7A, 9-10, 12-14, 15-20.

12. This Title VII holding results from a liberal construction of that statute which makes in unlawful for any "employer . . . to fail or refuse to hire . . . any individual . . . because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1)(quoted in Pelech at 508)(emphasis added). The use of the word "individual" instead of "employee" results in an interpretation of Title VII which "encompass[es] more than the traditional employer-employee relationship." Pelech at 508.

13. The legislature sought a similar result in the Iowa Civil Rights Act. There, the use of the word "person," instead of "employer" indicates that "person[s]" are to be held liable for denying access to employment to "applicant[s] for employment" by "refus[ing] to hire, accept, register, classify, or refer [them] for employment". Iowa Code § 601A.6(1)(a) (now § 216.6(1)(a)). See Conclusions of Law Nos. 6-9.

V. The Respondents Dr. Sahai and the Webster City Medical Clinic Can Also Be Held Liable As Agents of the Nissen Company For the Failure to Hire Complainant Davies:

14. The Federal Courts have found that an entity which certifies candidates as being qualified for an employer is liable for discrimination committed as an agent of that employer. Patzer v. Board of Regents, 577 F. Supp. 1553, 37 Fair Empl. Prac. Cas. 1019, 1021 (D. Wis. 1984)(Department of Administration, which certified candidates for university, found to be agent of university), *rev'd and rem'd on other grounds*, 763 F.2d 851, 37 Fair Empl. Prac. 1847 (7th Cir. 1985). The Court noted the Department "was in important respects the perpetrator of whatever discrimination took place." Id. A City-County Personnel Board was also held to be an agent of the city because it exercised powers traditionally exercised by an employer. Williams v. City of

Montgomery, 742 F.2d 586, 37 Fair Empl. Prac. Cas. 52, 54 (11 Cir. 1984), *cert. den'd*, 37 Fair Empl. Prac. Cas. 376 (U.S. 1985). These functions included formulating minimum standards for jobs, evaluating employees, and transferring, promoting, and demoting employees. Id. "Where the employer has delegated control of some of the employer's traditional rights, such as hiring or firing, [or in this case, evaluating the fitness of applicants for employment], to a third party, the third party has been found to be an employer by virtue of the agency relationship." Schlei, Employment Discrimination Law 1002 (1983).

15. In order to determine whether Respondents Sahai and Clinic are agents of Respondent Nissen Company, it is necessary to review the nature of the agency relationship:

> Agency is a legal concept which depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking, and **the understanding of the parties that the principal is to be in control of the undertaking.**The relation which the law calls agency does not depend upon the intent of the parties to create it, nor their belief that they have done so. **Toconstitute the relation, there must be an agreement, but not necessarily a contract, between the parties;** if the agreement results in the factual relation between them to which are attached the legal consequences of agency, an agency exists although the parties did not call it agency and did not intend the legal consequences of the relation to follow. Thus, when one who asks a friend to do a slight service for him, such as to return for credit goods recently purchased from a store, neither one may have any realization that they are creating an agency relation or be aware of the legal obligations which would result from performance of the service.

RESTATEMENT (SECOND) OF AGENCY §1 comment b (1959).

16. Respondents Sahai and Clinic argue, on brief, that they are not agents of Respondent Nissen because they were not subject to the control of Nissen. (Respondent's Brief at 16-18). Respondents Sahai and Clinic argue that the following facts demonstrate there is no control by Nissen:

> Neither Dr. Sahai nor The Medical Clinic had any type of written agreement or contract with Nissen to perform the physicals. (Tr. 100, l.25 and Tr. 101, l. 1-10). In addition, Nissen had never given Dr. Sahai or the Medical Clinic any particular directives as to the nature of the physical exam or how extensive a physical was to be performed. (Tr. 126, l. 3-9). It was left up to the individual doctor's discretion as to what type of physical should be done and what tests should be performed. (Tr. 125, l. 16-20; Tr. 126, l. 10-19). Finally, the Medical Clinic is compensated for the physicals on a per applicant basis and no special financial arrangement was made with Nissen for this service. (Tr. 125 l. 21-23).

(Respondent's Brief at 17).

17. There can be no doubt from the record that there is an agreement by Respondents Nissen, Sahai, and Clinic. See Findings of Fact Nos. 9-10. As noted in the Restatement comment, such agreement does not need to be a contract of any kind in order to result in an agency relationship. See Conclusion of Law No. 15. Respondents Sahai and Clinic agreed to an undertaking whereby, acting on Respondent Nissen's behalf, they would examine applicants sent by Nissen and make recommendations as to their fitness for hire. See Findings of Fact Nos. 9-10. While Respondents Sahai and Clinic are compensated by Nissen, the example given in the Restatement comment, of an agency relationship formed by performance of a gratuitous service for a friend, makes it clear compensation to the agent by the principal is not necessary to form an agency relationship. See Finding of Fact No. 9. See Conclusion of Law No. 15.

18. Thus, two of the elements of the agency relationship, "the manifestation by the principal that the agent shall act for him [and] the agent's acceptance of the undertaking" are established. See Conclusion of Law No. 15. Two of the facts cited by Respondents Sahai and Nissen, absence of a written agreement or contract and absence of a special financial arrangement for payment for the examinations are shown to be of no significance in determination of whether or not an agency relationship exists. See Conclusion of Law No. 16.

19. Therefore, the "fighting issue" of whether the alleged agent is subject to the control of the principal, Anderson v. Boeke, 491 N.W.2d 182, 187 (Iowa Ct. App. 1992), is reduced to the question of whether lack of "control of the undertaking" is demonstrated by Respondent Nissen's failure to control Respondent Sahai's and Clinic's actual physical conduct of the examinations with directives as to the nature, type, and extent of the physical examinations and tests done. See Conclusion of Law No. ___.

20. While control of an agent by a principal may extend to control of an agent's physical conduct, i.e the details of how the agent performs the undertaking, it is not necessary to demonstrate this level of control in order to establish an agency relationship. RESTATEMENT (SECOND) OF AGENCY *SS* 1 comments d, e; 2 (3) and comment b; 14 comments a, b; 14 N and comment a. (1959). *See also,* D.R.R. v. English Enterprises, CATV Division of Gator Trans. Inc., 356 N.W.2d 580 582-83 (Iowa Ct. App. 1984)("[a] person can be both an agent and an independent contractor"). A "principal" may include one "who has directed another to act on his account in business dealings . . . but who has no control or right of control over the [agent's] physical conduct." Id. at *S* 1 comment d. *See id* at § 1 comment e.

21. The example of the agency relationship established by the person (i.e. the principal) who obtains an agreement from a friend (i.e. his agent) to return goods to a store for credit serves to demonstrate how much "control of the undertaking" is needed to establish the agency. The "control of the undertaking" is demonstrated by the agreement that the agent is to perform a particular task for the principal. Certainly, the placement of the goods in the hands of the agent by the principal would be further evidence of such control. There is nothing in the example suggesting that the principal must direct the agent as to the means by which the goods will be taken to the store in order to establish an agency.

22. In this case, Respondent Nissen's control of the undertaking is amply demonstrated by Nissen having the exclusive right to determine which applicants will be sent to Respondent Clinic for

examination. The purpose of the examination is understood to be for Nissen's benefit. See Finding of Fact Nos. 9-14. Respondent Nissen's placement of confidence in the medical expertise of Respondents Sahai and Clinic, and of trust in their acting for Nissen's benefit, simply demonstrates that Respondents Sahai and Clinic are agents with fiduciary duties toward their principal, the Nissen Company. *See* RESTATEMENT (SECOND) OF AGENCY § 1 comment b (1959).

VI. Order and Allocation of Proof Where Complainant Relies on Direct Evidence of Discrimination:

23. "Direct evidence" is that "evidence, which if believed, proves existence of [the] fact in issue without inference or presumption." It is "that means of proof which tends to show the existence of a fact in question, without the intervention of the proof of any other fact, and is distinguished from circumstantial evidence, which is often called "indirect". BLACK'S LAW DICTIONARY 413-14 (1979). Either policies which on their face call for consideration of a prohibited factor or statements by relevant managers reflecting bias constitute direct evidence of discrimination. Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 477-78 (2nd ed. 1989).

24. The proper analytical approach in a case with direct evidence of discrimination is, first, to note the presence of such evidence; second, to make the finding, if the evidence is sufficiently probative, that the challenged practice discriminates against the complainant because of the prohibited basis; third, to consider any affirmative defenses of the respondent; and, fourth, to then conclude whether or not illegal discrimination has occurred. *See* Trans World Airlines v. Thurston, 469 U.S. 111, 121-22, 124-25, 105 S. Ct. 613, 83 L.Ed. 2d 523, 533, 535 (1985)(Age Discrimination in Employment Act). **With thepresence of such direct evidence, the analytical framework, involving shifting burdens of production, which was originally set forth in** McDonnell Douglas Corp. v. Green 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 207 (1973), **and subsequently adopted by the Iowa Supreme Court**, *e.g.* Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293, 296 (Iowa 1982); Consolidated Freightways v. Cedar Rapids Civil Rights Commission, 366 N.W.2d 522, 530 (Iowa 1985), **is inapplicable. Landals v. Rolfes Co**., 454 N.W.2d 891, 893-94 (Iowa 1990); Price-Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268, 301 (1989)(O'Connor, J. concurring); Trans World Airlines v. Thurston, 469 U.S. 111, 121, 124-25, 105 S. Ct. 613, 83 L.Ed. 2d 523, 533 (1985); Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 473, 476 (2nd ed. 1989).

25. The reason why the McDonnell Douglas order and allocation of proof is not applicable where there is direct evidence of discrimination, and why the employer's defenses are then treated as affirmative defenses, i.e. the employer has a burden of persuasion and not just of production, is because:

> [T]he entire purpose of the McDonnell Douglas prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by. That the employer's burden in rebutting such an inferential case of discrimination

> is only one of production does not mean that the scales should be weighted in the same manner where there is direct evidence of intentional discrimination.

Price-Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268, 301 (1989)(O'Connor, J. concurring). *See also* Landals v. Rolfes Co., 454 N.W.2d 891, 893-94 (Iowa 1990).

26. In this case, there is direct evidence in the record that sex, and specifically pregnancy, was the motivating factor in Respondents Nissen Company's, Sahai's, and Clinic's respective refusal to hire Complainant Davies, to classify her as being fit for hire, or to refer or recommend her for employment in an assembly line position. There is also direct evidence that it is Respondents Sahai's and Clinic's policy and practice to refuse to refer for employment or classify as fit for employment pregnant females who are selected for assembly line positions at Respondent Nissen's plant. See Findings of Fact Nos. 15-18. The inquiry, however, does not end there, for any affirmative defenses of the Respondents must be examined. Trans World Airlines v. Thurston, 469 U.S. 111, 121, 124-25, 105 S. Ct. 613, 83 L.Ed. 2d 523, 533 (1985).

27. Only one such affirmative defense is available. Respondents had to establish that sex (i.e. nonpregnancy) was a bona fide occupational qualification (BFOQ) for assembly line positions at Respondent Nissen Company's plant. "That is, that [the] worker must not be pregnant in order to perform the job capably." Omilian, Sex-Based Employment Discrimination §20.06 (1993). *See,* Iowa Department of Social Services v. Iowa Merit Employment Department, 261 N.W.2d 161, 166 (Iowa 1977); Cedar Rapids Community School Dist. v. Parr, 227 N.W.2d 486, 496 (Iowa 1975). For reasons discussed in greater detail below, the Respondents' failed to meet their burden of persuasion with regard to establishing this affirmative defense to these allegations. See Findings of Facts Nos. 21-30.

VII. Respondents Have Not Proven Any "Bona Fide Occupational Qualification" (BFOQ) Affirmative Defense:

28. The general rule is that "pregnant women who are able to work must be permitted to work on the same conditions as other employees." Atwood v. City of Des Moines, 485 N.W.2d 657, 660 (Iowa 1992). "An employer cannot refuse to hire a woman because of her pregnancy-related condition so long as she is able to perform the major functions necessary to perform the job." "Questions and Answers on Pregnancy Discrimination," EEOC Guidelines on Sex Discrimination, 29 C.F.R. §1604.

29. "[T}he 'unless based on the nature of the occupation' [exception set forth in Iowa Code] . . . section 601A.6 is 'akin to the bona fide occupational qualification [BFOQ] exception present in the federal fair employment legislation.'" Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162, 168 (Iowa 1982)(quoting Cedar Rapids Community School District v. Parr, 227 N.W.2d 486, 492 (Iowa 1975)). "An employer is permitted to discriminate on the basis of sex when such practice is justified by a bona fide occupational qualification." Polk County Juvenile Home v. Iowa Civil Rights Commission, 322 N.W.2d 913, 916 (Iowa Ct. App. 1982).

30. The relevant Bona Fide Occupational Qualification language in federal fair employment legislation allows otherwise illegal employment related actions "on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. §2000e-2(e).

31. As with any affirmative defense the Respondents bear the burden of persuasion with respect to the BFOQ defense, i.e. they must persuade the finder of fact by the greater weight of the evidence that their policy, of refusing to hire, or classify or refer for hire, pregnant women for assembly line positions, is based upon the nature of the occupation. *See* Cedar Rapids Community School District v. Parr, 227 N.W.2d 486, 492 (Iowa 1975).

32. The United States Supreme Court has held that "the BFOQ exception was in fact meant to be an **extremely narrow** exception to the general prohibition of discrimination on the basis of sex" in employment. Dothard v. Rawlinson, 433 U.S. 321, 334, 15 Fair Empl. Prac. Cas. 10, 16 (1977)(emphasis added).

33. "Since the BFOQ exception is contrary to the premise of the Iowa Civil Rights Act, it must be strictly construed." Polk County Juvenile Home v. Iowa Civil Rights Commission, 322 N.W.2d 913, 916 (Iowa Ct. App. 1982). "In order to justify the BFOQ exception, there must be no less restrictive alternative reasonably available to the employer." Id.

34. After noting that the BFOQ exception is read equally narrowly in both sex and age discrimination cases, the United States Supreme Court held that "[t]he wording of the BFOQ defense contains several terms of restriction that indicate that the exception reaches only special situations. . . . where . . . discrimination is 'reasonably necessary' to the 'normal operation' of the 'particular' business." Auto Workers v. Johnson Controls, 499 U.S. 187, 55 Fair Empl. Prac. Cas. 365, 372 (1991). Each of these terms:

> prevents the use of general subjective standards and favors an objective verifiable requirement. But the most telling term is "occupational"; this indicates that **these objective verifiable requirements must concern job-related skills and aptitudes.** . . . By modifying "qualification" with "occupational," **Congress narrowed the term to qualifications that affect an employee's ability to do the job.**

Id. (emphasis added). In order to establish sex as a BFOQ, there must be a "high correlation between sex and ability to perform job functions." Id. *See,* Iowa Department of Social Services v. Iowa Merit Employment Department, 261 N.W.2d 161, 166 (Iowa 1977)(BFOQ established when duties complainant cannot perform due to her sex "are very core and substance" of position); Polk County Juvenile Home v. Iowa Civil Rights Commission, 322 N.W.2d 913, 916 (Iowa Ct. App. 1982)(No BFOQ established for three Child Care Worker positions which could have been performed by either men or women).

35. In this case, the justification offered for sex discrimination is that Complainant Davies would face certain increased risks if she were to engage in assembly line work. There was no evidence

that she, as a basically healthy pregnant woman, was unable to do the work. See Finding of Fact No. 29. What is known as the "safety exception to the BFOQ" allows discrimination on the basis of sex and pregnancy due to safety concerns only in narrow circumstances. Auto Workers v. Johnson Controls, 499 U.S. 187, 55 Fair Empl. Prac. Cas. 365, 372 (1991). These circumstances involve the safety of third persons, other than the mother or fetus, such as airline passengers. Id. at 373. These third persons must be customers or others whose safety is essential to the business. Id. There is no evidence in the record indicating that the reasons for refusing Complainant Davies employment on the assembly line involves the safety of any such third persons. See Finding of Fact No. 22.

36. **In pregnancy discrimination cases, "danger to a woman herself does not justify [such] discrimination."** Id. (citing Dothard v. Rawlinson, 433 U.S. at 335, 15 Fair Empl. Prac. Cas. at 16). "[T]he argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice herself." Dothard v. Rawlinson, 433 U.S. at 335, 15 Fair Empl. Prac. Cas. at 16).
37. Fetal safety concerns also do not legally justify exclusion of pregnant women from employment. Auto Workers v. Johnson Controls, 499 U.S. 187, 55 Fair Empl. Prac. Cas. 365, 373 (1991). Fetal safety is "best left to the mother" and not determined by the employer or its agents, *see id*. (citing with approval Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 371 (4th Cir. 1980) and In Re National Airlines, Inc., 434 F. Supp. 249, 259 (SD Fla. 1977)), nor indeed by the courts [and, by implication, civil rights agencies acting in an adjudicatory capacity]. National Airlines at 259. The BFOQ provision permits no "fetal protection policies that mandate particular standards for pregnant . . . women." Auto Workers v. Johnson Controls, 499 U.S. 187, 55 Fair Empl. Prac. Cas. at 373.

38. The law is summarized by the Fourth Circuit Court of Appeals in Burwell:

> [The employer's] contention that an element of business necessity is its consideration for the safety of the pregnant [employee] and her unborn child is not persuasive. If this personal compassion can be attributed to corporate policy, it is commendable, but in the area of civil rights, personal risk decisions not affecting business operations are best left to individuals who are the targets of discrimination.

Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 371 (4th Cir. 1980). Respondents have not established that nonpregnancy is a BFOQ for assembly line positions at the Nissen Company plant.

VIII. The Actions of Respondents Sahai and Clinic Are Not Excused By Any Physician-Patient Relationship Between Dr. Sahai and Complainant Davies:

39. Without citation to any legal authority, Respondents Sahai and Clinic suggest that they cannot be held liable for discrimination in this case because physicians conducting pre-employment physicals should not be "placed in a position where they have to choose between violating their Hippocratic Oath to not knowingly do anything to harm a patient or face

discrimination allegations." Respondent's Brief at 26. The facts of this case involve no such choice.

40. First, there was no physician-patient relationship between Complainant Davies and Dr. Sahai at the time of her pre-employment physical. Respondents have admitted as much by repeatedly recognizing on brief that Davies was a "former patient" at the time of her examination. See Finding of Fact No. 31. This admission is binding on the Commission. See Conclusion of Law No. 3A.

41. The greater weight of legal authority holds that "[w]hen a physician performs a pre-employment physical examination on behalf of a prospective employer . . . the examinee is not deemed to be the physician's patient, and the physician-patient relationship does not arise." Louisell, 1 Medical Malpractice ¶ 8.02 (1991). *See also* Pegalis, 1 American Law of Malpractice 2d §2.4 (1992); Annot., 10 A.L.R.3d 1071, 1073 (1966) & Supp. (1993). The same holds true in other circumstances where a person is examined by a physician on behalf of another. *See e.g.* In Interest of Hoppe, 289 N.W.2d 613, 617 (Iowa 1980)(physician-patient relationship does not arise from court ordered examination).

42. The applicability of the Hippocratic Oath assumes an existing physician-patient relationship. McCafferty, Medical Malpractice: Bases of Liability §1.02 (1985). The physician-patient relationship is predicated on:

> [T]he patient [seeking] and obtain[ing] the services of the physician because of [his] special knowledge and skill [in diagnosing and treating diseases and injuries]. . . . The main obligation of the physician imposed upon him by law is the exercise of due care and skill in the treatment of his patient. [This] includes . . . his obligation to fully inform the patient of his condition, to continue to provide for medical care once the . . . relationship has been established, to refer him to a specialist, if necessary, and to obtain the patient's informed consent to the medical treatment or operation.

61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers* §167 (1981). In this case, it is clear that Complainant Davies was not seeking out treatment when she went for the pre-employment physical. See Finding of Fact No. 32.

43. Second, even if there had been a physician-patient relationship between Complainant Davies and Dr. Sahai, the patient has the virtually absolute right to refuse to follow the physician's advice or treatment. The relationship does not give the physician the right to compel the patient to follow a course of advice or treatment. Macdonald, Health Care Law: A Practical Guide §18.04(1) (1986). Thus, the applicant who is a patient has essentially the same right to determine what personal risks she wishes to take, with respect to employment, as an applicant who is not a patient. See Conclusion of Law No. 36. Employers, and presumably their agents, are, however, permitted to inform pregnant applicants of potential risks inherent in the job, including special risks they may face. Auto Workers v. Johnson Controls, 499 U.S. 187, 55 Fair Empl. Prac. Cas. at 375.

44. Finally, Respondents Sahai and Clinic voluntarily chose to enter into the business of evaluating applicants for employers, classifying them, and deciding whether or not to refer them for employment. This made these Respondents subject to the prohibitions of the Iowa Civil Rights Act. There are no exceptions, express or implied, in the Act for physicians or medical clinics. *See e.g.* Iowa Code §601A.6 (216.6).

IX. Remedies:

A. Remedial Action:

45.

> Violation of Iowa Code section 216.6 having been established the Commission has the duty to issue a cease and desist order and to carry out other necessary remedial action. Iowa Code §216.15(8) (1993). In formulating these measures, the Commission does not merely provide a remedy for this specific dispute, but corrects broader patterns of behavior which constitute the practice of discrimination. Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 770 (Iowa 1971). "**An appropriate remedial order should close off 'untraveled roads' to the illicit end and not 'only the wornone.**'" Id. at 771.

Maxine Boomgarden, slip. op. at 88.

B. Compensatory Damages: Back Pay:

1. *Purposes of Back Pay:*

46.

> 77. The award of back pay . . . in employment discrimination cases serves two purposes. First, "the reasonably certain prospect of a back pay award . . . provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate [employment discrimination]." Albemarle Paper Company v. Moody, 422 U.S. 405, 418-19, 95 S.Ct. 2362, 2371-72, 45 L. Ed. 2d 280 (1975). Second, back pay serves to "make persons whole for injuries suffered on account of unlawful employment discrimination." Id. 422 U.S. at 419, 95 S.Ct. at 2372. Both of these purposes would be served by an award of back pay in the present case.

Maxine Boomgarden, slip. op. at 91.

2. Commission's Authority and Burdens of Proof:

47.

> 73. The Commission has the authority to make awards of backpay. Iowa Code §216.15(8)(a)(1) (1993). In making such awards, interim earnings . . . received during the backpay period are to be deducted. Id. The Complainant bears the burden of proof in establishing his or her damages. Diane Humburd, 10 Iowa Civil Rights Commission Case Rpts. 1, 9 (1989)(citing Poulsen v. Russell, 300 N.W.2d 289, 295 (Iowa 1981)). *See* Children's Home v. Cedar Rapids Civil Rights Commission, 464 N.W.2d 478, 481 (Iowa Ct. App. 1990). The Complainant may meet that burden of proof by establishing the gross backpay due for the period for which backpay is sought. Diane Humburd at 10 (citing *e.g.* EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919, 924 (S.D. N.Y. 1976), *aff'd mem.*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977)). This the Complainant has done.
>
> . . .
>
> 75. The burden of proof for establishing the interim earnings, including unemployment insurance payments, of the Complainant rests with the Respondent. Diane Humburd at 10 (citing Stauter v. Walnut Grove Products, 188 N.W.2d 305, 312 (Iowa 1973); EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. at 924)). The Respondent also bears the burden of proof for establishing any failure of the Complainant to mitigate damages. Children's Home of Cedar Rapids v. Cedar Rapids Civil Rights Commission, 464 N.W.2d 478, 481 (Iowa Ct. App. 1990). The Complainant may, as Complainant Boomgarden has done here, choose to provide evidence of interim earnings she is willing to concede. Diane Humburd at 10.

Id. at 89-90.

3. Principles to Be Followed In Computing Back Pay:

48.

> 78. . . . [T]wo basic principles [are] to be followed in computing awards in discrimination cases: "First, an unrealistic exactitude is not required. Second, uncertainties in determining what an employee would have earned before the discrimination should be resolved against the employer." Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 530-531 (Iowa 1990). "It suffices for the [agency] to determine the amount of back wages as a matter of just and reasonable inferences. Difficulty of ascertainment is no longer confused with right of recovery." Id. at 531.

Maxine Boomgarden, slip. op. at 91-92.

4. Back Pay May Be Based on Comparable Employees:

49. The Commission may "calculate awards [based] on the experience of comparable employees outside of the claimant's protected class." Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d at 531.

5. Back Pay Terminated As of Date When Complainant Would Have Been Subsequently Laid Off If She Had Been Hired At Nissen's:

50. There is substantial legal authority supporting the termination of Complainant's back pay period as of the date she would have been laid off. (There was no evidence in the record of any subsequent recall). Belton, Remedies in Employment Discrimination Law § 9.26 & n.176 (1992).

C. Compensatory Damages: Emotional Distress:

1. Legal Authority For and Purpose of Power to Award Damages for Emotional Distress:

51. Respondents' Brief made reference to guidelines on the award of emotional distress damage set forth in the Cheri Dacy case. Cheri Dacy, 7 Iowa Civil Rights Commission Case Reports 17, 24-25 (1985). (Respondent's Brief at 27-28). The guidelines set forth in that decision have not been used for over five years. These guidelines have fallen into disuse for several reasons. First, absolutely no legal authority was cited in Dacy for any of the four categories set forth, i.e. employer motivation, severity of distress, length of effects or complainant status. Second, no legal authority is set forth for any of the factors listed under each category. Third, while authority can be found for considering the severity and the length of the distress, as set forth below; none has been found for the other two factors. Fourth, "employer motivation" and "complainant status" (which appears to be based on the dubious proposition that a complainant would be involved in discrimination against himself) are factors which would be more appropriate for punitive damages, not compensatory damages. Fifth, the guidelines are contrary to the well-recognized principle that emotional distress damages "are not capable of yardstick measurement." Therefore, the guidelines set forth in the Cheri Dacy case are overruled with respect to all categories and factors set forth therein. Of course, severity of distress and length of distress will still be considered as set forth below. The principles set forth in this and subsequent conclusions of law were those applied in determining the emotional distress award.

52. In considering the question of emotional distress damages, it must be borne in mind that the Act is a "manifestation of a massive national drive to right wrongs prevailing in our social and economic structures for more than a century," Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 765 (Iowa 1971).

53. Sex discrimination in employment is a serious matter. It demands a substantial remedy. The Iowa Civil Rights Act was enacted, in part, to provide such a remedy. *See* Iowa Code §§ 216.6, 216.15(8)(a)(8).

54. **By 1978, it became clear to the legislature that the extremely limited remedies originally enacted in 1965 were woefully inadequate to carry outthe remedial purposes of the act. Therefore, the act was amended, effective January 1, 1979, to give the Commission the**

power to award "actualdamages." 1978 Iowa Acts ch. 1179 §16. **These are synonymous with "compensatory damages". The purpose of such authority is not to remedyonly out-of-pocket losses while ignoring proven emotional distress damages, but to "make whole" the victims of discrimination for all lossessuffered as a result of discrimination**. *See* Iowa Code §216.15(8)(a)(8)(1993); Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 525-26 (Iowa 1990); Chauffers, Teamsters, and Helpers v. Iowa Civil Rights Commission, 394 N.W.2d 375, 383 (Iowa 1986). **"[T]he real purposebehind a civil rights award is to make the person whole for an injury suffered as a result of unlawful employment discrimination."** Allison-Bristow v. Iowa Civil Rights Commission, 461 N.W.2d 456, 459 (Iowa 1990).

55. **"[D]amages for emotional distress are recoverable under our civil rights statute."** Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 525 (Iowa 1990). **In 1986, the Iowa Supreme Court held:**

> **We agree with those jurisdictions allowing the award of emotional distress damages by the civil rights commission or its equivalent. Thisresult seems only natural because emotional distress is generally a compensable injury, and the language of the statute allows actual damageswhich are synonomous with compensatory damages.** Allowing the award of emotional distress damages is also consistent with the commission's discretion in fashioning an appropriate remedy.

Chauffeurs, Teamsters and Helpers, Local Union No. 238 v. Iowa Civil Rights Commission, 394 N.W.2d 375, 383 (Iowa 1986). **A victim of discriminationis to receive "a remedy for his or her complete injury," including damages for emotional distress.** Hy-Vee at 525-26.

56. The Iowa Supreme Court's observations on the emotional distress damages resulting from wrongful discharge are equally applicable to the distress resulting from hiring discrimination:

> **[Such action] offends standards of fair conduct . . . the [victim of discrimination] may suffer mentally. "Humiliation, wounded prideand the like may cause very acute mental anguish." [citations omitted]. We know of no logical reason why . . . damages should belimited to out-of- pocket loss of income, when the [victim] also suffers causally connected emotional harm. . . . We believe that fairnessalone justifies the allowance of a full recovery in this type of tort.**

Niblo v. Parr Mfg. Co., 445 N.W.2d 351, 355 (Iowa 1989).

57. Other courts have also made observations which apply to this case:

> Evidence of distress was received. That distress is not unknown when discrimination has occurred. . . . But as the trial progressed it became more apparent that the psychic harm which might accompany an act of discrimination might be greater than would first appear. . . .**Discrimination is a vicious act. It**

> **may destroy hope and any trace of self-respect. That . . . is perhaps the injury which is felt the mostand the one which is the greatest.**

Belton, Remedies in Employment Discrimination Law 408 (1992)(quoting Humphrey v. Southwestern Portland Cement Company, 369 F. Supp. 832, 834 (W.D. Tex. 1973).

58.

> Emotions are intangible but are no the less perceptible. The hurt done to feelings and to reputation by an invasion of [civil] rights is no less real and no less compensable than the cost of repairing a broken window pane or a damaged lock. Wounded psyche and soul are to be salved by damages as much as the property that can be replaced at the local hardware store.

Id. (quoting Foster v. MCI Telecommunications Corp., 773 F.2d 1116, 1120 (10th Cir. 1985)(quoting Baskin v. Parker, 602 F.2d 1205, 1209 (5th Cir. 1979)).

2. "Humiliation," "Wounded Pride," "Anger", "Hurt" and "Upset" Are All Forms of Compensable Emotional Distress:

59. **Among the many forms of emotional distress which may be compensated are "anger," "upset," "hurt,"** Kentucky Commission on Human Rights v. Fraser, 625 S.W.2d 852, 856 (Ky. 1981); 2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases 24- 29 (1982)(citing Fraser and 121-129 Broadway Realty v. New York Division of Human Rights, 49 A.D.2d 422, 376 N.Y.S.2d 17 (1975)),**"humiliation, wounded pride, and the like."** Niblo v. Parr Mfg. Co., 445 N.W.2d at 355.

3. Liberal Proof Requirements for Emotional Distress Are Consistent With the Requirement That The Statute Is To Be Liberally Construed to Effectuate ItsPurpose:

60. Emotional distress damages must be proven. Blessum v. Howard County Board of Supervisors, 295 N.W.2d 836, 845 (Iowa 1980). These damages must be and have been proven here, as in any civil proceeding, by a preponderance or "greater weight" of the evidence and not by any more stringent standard. Iowa R. App. Pro. 14(f)(6).

61. Sex discrimination in employment violates:

> not only a statute but a strong public policy underlying that statute. . . . [O]ur civil rights statute is to be liberally construed to eliminate unfair and discriminatory acts and practices. [Citation omitted]. **We therefore hold a civil rights complainant may recover compensable damages foremotional distress without a showing of physical injury, severe distress, or outrageous conduct.**

Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 526 (Iowa 1990)(emphasis added).

4. Emotional Distress Caused by Discrimination is to Be Compensated:

62. **The emotional distress sustained by the Complainant is substantial. Since even mild emotional distress resulting from discrimination is to becompensated, it is obvious that compensation must be awarded here.** Rachel Helkenn, 10 Iowa Civil Rights Commission Case Reports 62, 73 (1990); Robert E. Swanson, 10 Iowa Civil Rights Commission Case Reports 36, 45 (1989); Ann Redies, 10 Iowa Civil Rights Commission Case Reports 17, 28 (1989). *See* Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 525-26 (Iowa 1990)(citing Niblo v. Parr Mfg., Inc., 445 N.W.2d 351, 355 (Iowa 1989)(adopting reasoning that because public policy requires that employee who is victim of discrimination is to be given a remedy for his complete injury, employee need not show distress is severe in order to be compensated for it)).

5. Emotional Distress May Be Proven By Either Testimony of A Complainant Alone or Supported By the Testimony of Others:

63. **"The [complainants'] own testimony [in this case is] solely sufficient to establish humiliation or mental distress."** Williams v. TransWorld Airlines, Inc., 660 F.2d 1267, 1273, 27 Fair Empl. Prac. Cases 487, 491 (8th Cir. 1981). *See also* Crumble v. Blumthal, 549 F.2d 462, 467 (7th Cir. 1977); Smith v. Anchor Building Corp., 536 F.2d 231, 236 (8th Cir. 1976); Phillips v. Butler, 3 Eq. Opp. Hous. Cas. § 15388 (N.D. Ill. 1981); Belton, Remedies in Employment Discrimination Law 415 (1992). Of course, testimony of a complainant's family members may also be supportive of a finding of emotional distress, as it is here for Complainant Davies. *See* Blessum v. Howard County Board of Supervisors, 295 N.W.2d 836, 845 (Iowa 1980)(supportive testimony of spouse).

6. Evidence of Counseling, Depression, and Crying In This Case Helps Establish Emotional Distress Although Such Damages Can Be Awarded In theAbsence of Evidence of Economic Loss or Physical or Mental Impairment:

64. In discrimination cases, an award of damages for emotional distress can be made in the absence of "evidence of economic or financial loss, or medical evidence of mental or emotional impairment." Seaton v. Sky Realty, 491 F.2d 634, 636 (7th Cir. 1974). Nonetheless, the evidence of crying and depression by the Complainant, may be considered when assessing the existence or extent of emotional distress. *See* Blessum v. Howard County Board of Supervisors, 295 N.W.2d 836, 845 (Iowa 1980); Fellows v. Iowa Civil Rights Commission, 236 N.W.2d 671, 676 (Iowa Ct. App. 1988)(depression). Evidence of counseling for the distress resulting from discrimination also supports the claim. *See* Fellows at 676.

7. Determining the Amount of Damages for Emotional Distress:

65.

> [D]etermining the amount to be awarded for [emotional distress] is a difficult task. As one court has suggested, "compensation for damages on account of

> injuries of this nature is, of course, incapable of yardstick measurement. It is impossible to lay down any definite rule for measuring such damages."

2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases 24-29 (1982)(quoting Randall v. Cowlitz Amusements, 76 P.2d 1017 (Wash. 1938)).

66. Although awards in other cases have little value in determining the amount an award should be in another specific case, Lynch v. City of Des Moines, 454 N.W.2d 827, 836-37 (Iowa 1990), there are many examples of such awards, ranging from $500 to $150,000, for emotional distress in discrimination cases. *See e.g.* Belton, Remedies in Employment Discrimination Law 416 n.78 (1992)(listing awards in 19 cases; 17 of which were for $10,000 or over). The Iowa District Court for Polk County recently awarded eighty thousand dollars ($80,000) to a sex discrimination plaintiff for emotional distress. Pamela Farren v. Super Valu Stores, Inc., Law No. Cl100-57791, slip op. at 22 (Polk Co. Dist. Ct. March 4, 1994). While any award should be tailored to the particular case, one commentator has noted that "a $750 award for mental distress is 'chump change.' Awards must be made which are large enough to compensate the victim of discrimination adequately for the injury suffered." 2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases 60-61 (1982).

67. Like back pay, the reasonably certain prospect of an emotional distress damages award, when such damages are proven, serves to encourage employers and others involved in the hiring process to evaluate their own procedures to ensure they are nondiscriminatory. The consistent failure to award such proven damages will remove this incentive and may encourage discriminatory practices. *See* id. at 61. *Cf.* Albemarle Paper Company v. Moody, 422 U.S. 405, 418-19, 95 S.Ct. 2362, 2371-72, 45 L. Ed. 2d 280 (1975)(back pay).

68.

> 45. The two primary determinants of the amount awarded for damages for emotional distress are the severity of the distress and the duration of the distress. Bean v. Best, 93 N.W.2d 403, 408 (S.D. 1958)(citing Restatement of Torts § 905). "'In determining this, all relevant circumstances are considered, including sex, age, condition of life, and any other fact indicating the susceptibility of the injured person to this type of harm.' And continuing 'The extent and duration of emotional distress produced by the tortious conduct depend upon the sensitiveness of the injured person.'" Id. (quoting Restatement of Torts *S* 905). *[See also* Restatement (Second) of Torts §905 (comment i).]

Dorene Polton, 10 Iowa Civil Rights Commission Case Reports 152, 166 (1992).

69.

> 31. A wrongdoer takes the person he injures as he finds him. McBroom v. State, 226 N.W.2d 41, 45 (Iowa 1975). A previously disabled person injured by the acts of a wrongdoer "is entitled to such increased damages as are the natural and

> proximate result of the wrongful act." Id. at 46; Keeton, Prosser and Keeton on the Law of Torts 292 (1984). This principle applies to psychological and emotional injuries. McBroom v. State, 226 N.W.2d 41, 45 (Iowa 1975).
>
> 32. On the other hand, the wrongdoer is not required to pay damages for emotional distress resulting from sources completely independent of its conduct. *See* Keeton, Prosser and Keeton on the Law of Torts 292, 345, 348-50 (1984). *Cf.* Lynch v. City of Des Moines, 454 N.W.2d 827, 836 (Iowa 1990)(upholding award of emotional distress damages in sexual harassment case against appeal of damages as inadequate--noting some distress due to other turmoil in complainant's life unrelated to discriminatory actions of employer). With items such as pain and suffering, where the extent of the harm is almost incapable of definite proof, the factfinder is granted wide latitude in determining what amount of damage is attributable to the wrongdoer despite the absence of specific proof. Keeton, Prosser and Keeton on the Law of Torts 348- 350 & nn.47, 49 (1984).

Royd Jackman, XI Iowa Civil Rights Commission Case Reports 70, 82 (1991).

DECISION AND ORDER

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. The Complainant Stacey Davies and the Iowa Civil Rights Commission, are entitled to judgment because they have established that Respondents Nissen Company, Subhash Sahai, M.D., and Webster City Medical Clinic, Inc. failed to hire her for an assembly line position at Nissen due to her sex, i.e. her pregnancy. This failure to hire her because of her sex is a violation of Iowa Code Section 601A.6 (now 216.6).

B. Complainant Davies is entitled to a judgment against Respondents of two thousand seven hundred thirty-two dollars and ninety-nine cents ($2732.99) in back pay for the loss of employment resulting from sex discrimination.

C. Complainant Davies is entitled to a judgment against Respondents of eight thousand five hundred dollars ($8,500.00) in compensatory damages for emotional distress.

D. Interest at the rate of ten percent per annum shall be paid by the Respondents to Complainant Davies on her award of back pay commencing on the date payment would have been made if she had been hired and continuing until date of payment.

E. Interest at the rate of ten percent per annum shall be paid by the Respondent to Complainant Davies on the above award of emotional distress damages commencing on the date this decision becomes final, either by Commission decision or by operation of law, and continuing until date of payment.

F. Respondents are hereby ordered to cease and desist from any further practices of sex discrimination in employment.

G. Respondents Sahai and Webster City Medical Clinic, Inc. shall develop, within 120 days of this order, written policies concerning recommendations made to employers regarding the suitability for employment of pregnant job applicants. These policies shall be based on the legal principles set forth in this decision. These policies shall be subject to the approval of the Commission. In the event, in the sole judgment of the Commission's representative, agreement cannot be reached on the language of such policy, the version drafted by the Commission shall be adopted by Respondents.

Signed this the 22nd day of June 1994.

DONALD W. BOHLKEN
Administrative Law Judge
Iowa Civil Rights Commission
211 E. Maple
Des Moines, Iowa 50319
515-281-4480

FINAL DECISION AND ORDER

1. On this date, the Iowa Civil Rights Commission, at its regular meeting, adopted the Administrative Law Judge's proposed decision and order with all the modifications set forth in the Commission's Exceptions to the Proposed Decision and Order filed on August 11, 1994. The proposed decision and order, as so modified, is hereby incorporated in its entirety as if fully set forth herein.

IT IS SO ORDERED.

Signed this the 23rd day of August, 1994.

Dale Repass
Vice-Chairperson
Iowa Civil Rights Commission
211 E. Maple
Des Moines, Iowa 50319

NOTE: The Conclusions of Law were modified to provide:

"Hearing Costs;

70. Since the Commission and the complainant have prevailed in this case, an order warranting contested case costs is appropriate. The record should be held open so a bill of costs may be submitted after this decision becomes final.

The Decision and Order were modified to provide additionally;

"H. Respondents are assessed all hearing costs allowed by Commission rule 4.7(3) and which are actually incurred in the processing of this public hearing. The precise calculation of costs shall be as shown on the bill of costs which is to be issued under the executive director's signature after this decision becomes final. The record shall be held open for this purpose.

The Respondent's Subhash Sahai, M.D. and Webster City Medical Clinic Inc. filed a petition for judicial review of the Commission's final decision in the Iowa District Court for Hamilton County on September 27, 1994.